IN THE
SUPREME COURT OF MISSOURI

IN THE MATTER OF THE CARE AND TREATMENT OF, TIMOTHY DONALDSON,	)	
Appellant,	)	
v.	)	Case No. SC87569
STATE OF MISSOURI,	)	
Respondent.	)	

Appeal from the Circuit Court, Probate Division
of Vernon County, Missouri
The Honorable Gerald D. McBeth, Judge

Substitute Brief of Respondent State of Missouri

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ATTORNEYS FOR RESPONDENT
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I. Procedural history

Timothy Donaldson has been tried twice under the SVP law, in 2001 and 2004. Both times, a jury found him to be a sexually violent predator. The first trial was in May 2001 (LF 6). That judgment was reversed on July 10, 2002 because the verdict-directing instruction did not comply with the requirement later announced in *In The Matter of the Care and Treatment of Thomas*, 74 S.W.3d 789 (Mo. banc 2002) (LF 55).

The case was called for retrial on January 27, 2004 (LF 3). But after the strikes for cause, there were only 18 jurors competent to serve, and the trial court granted Mr. Donaldson's motion for mistrial (LF 3).

In a sexually violent predator case, the declaration of a mistrial triggers MO. REV. STAT. §632.495 (2000),[1] which provides, in pertinent part, that

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[1] All statutory references are to the Revised Statutes of Missouri (2000), unless otherwise noted.

> any subsequent trial following a mistrial shall be held within ninety days ... unless ... trial is continued as provided in section 632.492.

In turn, §632.492 provides that

> trial may be continued upon request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent shall not be substantially prejudiced.

The record reflects that when the lower court declared the mistrial, the court and the parties immediately turned to a discussion of a new trial setting (Tr. 19).[2] The court identified and

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[2] To be clear, the cited portion of the transcript is an exchange between Mr. Donaldson's and the State's respective trial counsel at the conference held immediately before Mr. Donaldson's September 2004 retrial. Tr. 18-22. Mr. Donaldson had renewed his motion to dismiss for failure to be retried within 90 days, and the State's trial counsel asked to make a record on the retrial issue, which the trial court allowed and the attorneys proceeded to

tentatively set – or "penciled in" – an April 2004 trial date, within the 90-day time frame, and asked the attorneys to check whether their expert witnesses were available on that date. *Id.* It later became apparent that the court had a conflict with that date and could not retry the case in April (Tr. 20-21). Subsequently, Mr. Donaldson's expert – Dr. Maskel – "refused to cooperate in any way with trying this case within 90 days" (Tr. 19).[3] As Mr. Donaldson's trial counsel later summarized, there was "good reason to continue the case either because the Court wasn't available or because an expert wasn't available[.]" (Tr. 21).

Mr. Donaldson filed a motion to dismiss – on the 99th day after the mistrial – for failure to be tried within 90 days. The trial court denied the motion on the same day, entering the following order: "Motion to Dismiss is over ruled. Court finds the

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do. Tr. 19.

[3] This is a quotation from the State's trial counsel. Mr. Donaldson's trial counsel conceded that the expert was not available within the 90 days. Tr. 20, lines 23-24 (Mr. Donaldson's trial counsel told the court that Dr. Maskel's lack of availability was "not the only reason this case wasn't tried at that April date.")

Administration of Justice require same. Trial set Sept 29, 30, and Oct 1, 2004...." (LF 3).[4]

He was tried again on September 29, 2004. The jury found that Mr. Donaldson is a sexually violent predator (LF 273).

Mr. Donaldson appealed to the Court of Appeals, Western District, case no. WD65069. That court reversed, on the issue of the timing of his retrial. Slip. Op. (January 10, 2006). The Western District denied the State's request for rehearing or transfer. On April 11, 2006, this Court granted the State's motion for transfer.

II. The evidence

A. The pre-trial, draft policy issue

The Missouri Department of Corrections is an agency with the statutory duty to give written notice to the proper authorities that a person in its custody may meet the criteria of a sexually

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[4] Mr. Donaldson then filed writs of prohibition in the Western District and this Court, which both courts denied. LF 156-198. (*State ex rel. Donaldson v. McBeth*, Mo. Court of Appeals, W.D., case no. WD64559); and LF 199-206 (*State ex rel. Donaldson v. McBeth,* Mo. Supreme Court, case no. SC86317).

violent predator. §632.483., RSMo (2000).[5] In December 1998, the month prior to the effective date of the Sexually Violent Predator Act, Dr. Jonathan Rosenboom, Assistant Director of Mental Health Services for the Department of Corrections, circulated an interoffice memo on "draft potential sexually violent predator department policy," (Supp. LF 4), and attached a draft of a proposed department policy to the memo (Supp. LF 5- 7).

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[5] Section 632.483.1 provides: "When it appears that a person may meet the criteria of a sexually violent predator, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team."

In turn, a multidisciplinary team and a prosecutors' review committee make their own determinations of whether a person meets the definition of a sexually violent predator, and so notify the attorney general. §632.483.4 and .5. "When it appears that the person ... may be a sexually violent predator and the prosecutors' review committee ... has determined by a majority vote[ ] that the person meets the definition of a sexually violent predator, the attorney general may file a petition" for the person's commitment as an SVP. §632.486, RSMo (2000).

This original draft policy stated that Corrections should list potential sexually violent predators for referral using two criteria – those who "1. Have been convicted of a sexually violent offense, [and] 2. Have failed, refused or been terminated from the Missouri Sex Offender Program (MOSOP) and have exhausted all opportunities to complete the MOSOP to the attorney general and multidisciplinary team for review" (Supp. LF 6). Corrections never formally promulgated the policy. But in the first half of 1999, Corrections did not in fact refer prisoners who had successfully completed MOSOP (Supp. LF 23-24).

Mid-year, the draft policy underwent a revision. In July 1999, the draft was changed to remove the second criterion, such that completion of MOSOP did not exclude an individual from referral as a potential sexually violent predator (Supp. LF 41. 50). As of July 1999, Corrections proceeded to include for referral under §632.483 persons who had completed MOSOP. *Id.*

Corrections referred Mr. Donaldson for review on October 25, 1999 (LF 11, ¶4). The State filed the petition for his care and treatment as an SVP on December 3, 1999 (LF 10). Mr. Donaldson completed MOSOP at the end of January 2000 (Supp. LF 52).

Mr. Donaldson filed a pre-trial motion, seeking dismissal of the State's petition on the basis that the Department of Corrections' draft policy precluded his referral for review as an SVP at all (Supp. LF 1).[6]

The trial court denied the motion (LF 3).

B. The trial

Mr. Donaldson's mental abnormality was exhibited by his life history. In 1983, Mr. Donaldson committed an armed robbery (Tr. 439, line 18). He plead guilty to the felony and was placed on probation (Tr. 440, line 2). He violated the terms of the probation by drinking alcohol, but remained on probation (Tr. 440, line 6).

On December 7, 1985 (Tr. 296, line 20), while still on probation, Mr. Donaldson raped (Tr. 303, line 6) and sodomized D.F. (Tr. 302, line 13). He met D.F. at a party. D.F. wanted to go home earlier than her friends, and he offered her a ride. He acted "very gentlemanly, very nice" (Tr. 299, line 17). She agreed to let

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[6] The motion stated, incorrectly, that the draft policy that existed as of October 1999 was the original draft (with the exclusion for completion of MOSOP), Supp. LF 2, rather than the July 1999 revision (that removed the exclusion).

him drive her home. Instead of driving her home, Mr. Donaldson took a different route into an isolated area. D.F. told him he was going the wrong way, and she wanted to go home, but he did not turn around. Mr. Donaldson hit D.F., told her to shut up, and told her different things like "I want to cum in your mouth" or "I'm going to fuck you" (Tr. 301, line 18).

D.F. kept asking to go home (Tr. 302, line 2). Mr. Donaldson made D.F. perform oral sex and ejaculated in her mouth (Tr. 302, line 14). D.F. continued to ask to go home (Tr. 302, line 24) and Mr. Donaldson continued to hit her (Tr. 302, line 25). Mr. Donaldson told her to pull down her pants, despite D.F.'s protests (Tr. 303, line 1). He then had sexual intercourse with D.F. and fell asleep (Tr. 303, line 7). D.F. put on her clothes but did not leave; because of the isolation of the area, she did not know where to go (Tr. 304, line 7). After Mr. Donaldson woke up, he beat D.F. for having her clothes on and proceeded to rape and sodomize her again (Tr. 304, line 15). During the entire ordeal, Mr. Donaldson repeatedly hit D.F. to the point she could see white spots (Tr. 306, line 2). After several hours, Mr. Donaldson dropped D.F. four miles from her home (Tr. 306, line 8).

D.F. notified the police and went to a hospital for a rape kit (Tr. 306, line 22).

After being arrested, Mr. Donaldson gave written statements to law enforcement (Tr. 443, line 23). He admitted that he "forced [D.F.] to do sexual intercourse by – by hitting her in the head with my fist. She was always afraid of me. Had a scared look on her face" (Tr. 443, line 24). Mr. Donaldson also wrote that he "did the same thing to two other girls" (Tr. 444, line 6).

In 1986, Mr. Donaldson plead guilty to the sodomy charges (Tr. 446, line 3). While imprisoned in the Department of Corrections, he completed the Missouri Sex Offenders Program (Tr. 446, line 22). He was paroled in 1989 (Tr. 447, line 2).

While out on parole, Mr. Donaldson met K.P. at a bar. Before the night was over, he beat her to the point of unconsciousness, chipping her tooth, and sodomized her (Tr. 447, line 3).

Mr. Donaldson plead guilty to this sex offense and was again sentenced to the Department of Corrections (Tr. 448, line 7). While in prison, Mr. Donaldson failed in his next two attempts to complete MOSOP (Tr. 448 , line 10).

Mr. Donaldson was paroled again in 1996 (Tr. 449, line 7). While on parole, he violated the conditions of his parole by going to a prostitute, using alcohol, and stealing and cashing his niece's check (Tr. 449, line 21). He was again returned to the Department of Corrections (Tr. 450, line 3).

On December 3, 1999 the State filed a petition in the Circuit Court of Vernon County, Probate Division seeking to have Mr. Donaldson certified as a sexually violent predator under §632.480, *et seq.* (LF 11).

While still in the Department of Corrections, in 2000 Mr. Donaldson again completed the MOSOP program (Tr. 450, line 8).

While awaiting disposition of the SVP petition, Mr. Donaldson was living in the care of the Department of Mental Health. There, he had problems with authority over him, especially when authority was exercised by a female. On different occasions he yelled at female staff members, calling them "bitch," "fat bitch," "fucking bitch" (Tr. 360, line 1) an "educated idiot," "brown cow," and "fat cow" (Tr. 361, line 22).

In addition to the above-recited evidence of his offenses and incarceration history, the jury heard the testimony of two experts,

one called by the State (Roy Lacoursier, M.D.) and one by Mr. Donaldson (Lynn Maskel, M.D.).

Dr. Lacoursier, a psychiatrist, examined Mr. Donaldson (Tr. 435). He diagnosed Mr. Donaldson with personality disorder not otherwise specified; sexual sadism; paraphilia; substance abuse; and a gambling disorder (Tr. 455, line 11).

Dr. Lacoursier testified at length about his findings. He testified that, to a reasonable degree of medical certainty, Mr. Donaldson's personality disorder and sexual sadism both qualify as mental abnormalities, congenital or acquired conditions affecting the emotional or volitional capacity that predispose the person to commit sexually violent offenses in a degree that causes the individual serious difficulty in controlling his behavior. (Tr. 437; Tr. 476-480; Tr. 481-Tr. 482).

He also testified that, to a reasonable degree of medical certainty, the mental abnormalities make Mr. Donaldson more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility (Tr. 437; Tr. 481- 496).

Dr. Maskel, Mr. Donaldson's expert, testified that he has antisocial personality disorder (Tr. 675), but not sexual sadism (Tr.

693) or paraphillia (Tr. 704). She testified that his antisocial personality disorder did not qualify as a mental abnormality for purposes of the SVP law, because in her opinion, the disorder did not cause him serious difficulty in controlling his behavior (Tr. 709, line 13). Because she determined that Mr. Donaldson had no qualifying mental abnormality, she did not consider his risk of reoffending if not confined (Tr. 712- 713).

The jury found that Mr. Donaldson is a sexually violent predator (LF 273). The trial court issued its Judgment and Order, committing Mr. Donaldson to the custody of the Department of Mental Health for control, care and treatment until such time as his mental abnormality has so changed that he is safe to be at large (LF 274).

Argument

I. The trial court correctly refused to dismiss the State's case for Mr. Donaldson's care and treatment on the basis of the timing of the trial. The administration of justice required the trial to be held beyond the 90th day after mistrial, and Mr. Donaldson was not prejudiced. [responds to Appellant's Point II]

Standard of review. Mr. Donaldson argues in his Point II that the trial court should have granted his motion to dismiss, because it lost subject matter jurisdiction to proceed on the 91st day after the mistrial. When the facts bearing on a trial court's subject matter jurisdiction are in dispute, the appellate court reviews the trial court's decision on a motion to dismiss for abuse of discretion; if the facts are not in dispute and the issue is purely a question of law, then review is *de novo*. *Missouri Soybean Assoc. v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003); *Crow v. Kansas City Power & Light Co.*, 174 S.W.3d 523, 528 (Mo. App. W.D. 2005).

Here, the issue does not appear to be a pure question of law. The facts were either in dispute, or the issue is a mixed question of law and fact. Therefore, this Court should review the trial

court's decision for abuse of discretion. The trial court did not abuse its discretion in denying Mr. Donaldson's motion to dismiss.

A. The trial court continued the trial in accordance with the statutes.

The Court begins with the plain language of the statutes. *Hallmark Cards, Inc. v. Director of Revenue*, 159 S.W.3d 352, 354 (Mo. banc 2005)("In determining the meaning of a statute, the starting point is the plain language of the statute itself."). Section 632.495 provides that

> any subsequent trial following a mistrial shall be held within ninety days ... unless ... trial *is continued as provided in section 632.492*. [emphasis added]

In turn, §632.492 provides that

> trial may be continued upon request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent shall not be substantially prejudiced.

Nothing in §632.495 or §632.492 requires the court to enter an order of continuance within the 90-day time frame. Instead, §632.495 provides that trial may be had beyond 90 days if the trial "is continued as provided" in §632.492. What §632.492 "provides" is a set of criteria that speak to sound reasons for exceeding the 90-day time frame – the request of either party and a showing of good cause, or the need of the court in the due administration of justice – coupled with the requirement that the respondent not be substantially prejudiced.

To the extent that the Western District read the statutes to require the entry of an order of continuance within the 90-day time frame, such language does not appear.

And the trial court properly applied the criteria that the statutes provide. The court penciled in an April 2004 setting (a date within the 90 days), but subsequently could not hear the case on that date and had to reset it. The court's need to find an open date for a trial setting, because it had no available date within the 90 days, is the due administration of justice. Also, Mr. Donaldson's expert was not available within the 90 days – she refused to make herself available. And Mr. Donaldson never requested a

continuance. Declining to set a date within the 90 days, when the respondent's expert was not available, is also the due administration of justice. This is particularly apparent when Mr. Donaldson's trial counsel acknowledged that either of these reasons constituted "good reason" why the case could not be tried within the 90 days, and never claimed that the continuance worked substantial prejudice upon him.

The trial court appropriately invoked the language of §632.492 when it entered its order memorializing the need for a continuance to accommodate the administration of justice, albeit on the 99th day. That is all that the statutes require.

But Mr. Donaldson argues that the trial court's order, finding that the due administration of justice required the continuance, is unsupported by any evidence, and in the nature of a convenient rationalization after the fact. Appellant's Substitute Brief, pp. 58-59. As discussed above, the evidence is sufficient and was conceded by Mr. Donaldson's trial counsel. Nevertheless, the trial court was in the best position to ascertain the facts and draw its conclusions regarding the due administration of justice. To the extent that Mr. Donaldson disputes the facts, this Court reviews

for abuse of discretion. And the foregoing demonstrates that the trial court did not abuse its discretion.

Even if the record displays any error that requires correction, which the State does not concede, it is a minor clerical error – the omission of a docket entry. "Where ... the judge's intentions are clear from the record, clerical mistakes ... may be corrected by a nunc pro tunc order." *State v. Jackson*, 158 S.W.3d 857, 857 (Mo. App. E.D. 2005). Nunc pro tunc orders are appropriate in civil cases, Rule 74.06(a) and *Johnson v. Brown*, 154 S.W.3d 448 (Mo. App. S.D. 2005), such as this case.

Short of a formal docket entry made on the day of the mistrial, the record comes as close as it could to establishing the fact that the trial was continued in accordance with the statutes. The remedy for any clerical omission is remand for entry of a nunc pro tunc order, not wholesale dismissal of the State's case seeking the commitment for care and treatment of a sexually violent predator.

The propriety of a nunc pro tunc order to correct a simple clerical error on the part of the court is all the more apparent in view of the fact that the reasons why the case could not be tried

within the 90 days had nothing to do with any conduct on the part of the State and that the continuance was to Mr. Donaldson's benefit because it gave him the chance to have his expert testify. And as discussed below, a dismissal is not supported by the statutes and is not in keeping with the purpose of the sexually violent predator law.

B. Even if the trial court misapplied the statutes, it did not lose subject matter jurisdiction.

If the Court holds that the trial court misapplied the statute, which it did not, the Court should hold that the trial court retained subject matter jurisdiction and properly proceeded to trial. The SVP statutes provide no penalty when a trial is not had within 90 days of a mistrial; they certainly do not provide that the trial court loses jurisdiction. And reading the SVP statutes to provide that the trial court does lose jurisdiction adds a judicial gloss that is not in keeping with the purpose of the SVP law.

Section 632.495 provides no penalty for failure to retry a case within 90 days of a mistrial. The "shall" language of §632.495 is not mandatory, but directory. "Whether the statutory word 'shall'

is mandatory or directory is a function of context. Where the legislature fails to include a sanction for failure to do that which 'shall' be done, ... 'shall' is directory, not mandatory." *Farmers & Merchants Bank & Trust Co., v. Director of Revenue,* 896 S.W.2d 30, 32 (Mo. banc 1995). After *Farmers,* this Court emphasized that the presence or absence of a penalty provision is not dispositive of the issue – whether "shall" is mandatory or directory is primarily a function of context and legislative intent. *Bauer v. Transitional School District of the City of St. Louis,* 111 S.W.3d 405, 408 (Mo. banc 2003).

To be sure, many Missouri statutes and agency rules include the word "shall" and courts have routinely construed the word as directory where the statute contains no penalty provision.[7] And

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[7] *State v. Tisius,* 92 S.W.3d 751, 770 (Mo. banc 2003) (Supreme Court Operating Rule 16:03(b): Media coordinator "shall" give five days notice to parties that cameras will be present in courtroom); *Farmers,* 896 S.W.2d at 32-33 (§143.831, RSMo (1994): director of revenue "shall" mail notice of her decision on a refund claim within 120 days); *Orion Security, Inc. v. Bd. of Police Commissioners,* 90 S.W.3d 157, 168 (Mo. App. W.D. 2002) (17 C.S.R. §10-2.060(II)(B)): notice of suspension of security company license

when the legislature wishes to establish a trial deadline of a jurisdictional nature, it says so: For example, MO. REV. STAT. §217.460 (2000) provides not just that an offender's indictment, information or complaint shall be brought to trial within 180 days,

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"shall" be signed by chief of police or designee); *Citizens for Environmental Safety, Inc. v. Mo. Dep't of Natural Resources,* 12 S.W.3d 720, 726 (Mo. App. S.D. 1999) (*e.g.,* 10 C.S.R. 80-2.020(4)(A)(2): MDNR shall act on completed permit application within 120 days); *State ex rel. Mo. Hwy. and Transp. Comm'n v. Muegge,* 842 S.W.2d 192, 195 (Mo. App. E.D. 1992) (§523.053(2), RSMo (1986): court "shall" hear motion for distribution of condemnation motion within 30 days of its filing); *Kersting v. Director of Revenue,* 792 S.W.2d 651, 653 (Mo. App. E.D. 1990) (§302.225.2, RSMo (1986): circuit court "shall" notify director within 10 days of any condition requiring suspension or revocation of driving privileges); *State v. Twill,* 753 S.W.2d 333, 334 (Mo. App. S.D. 1988) (§552.040.4, RSMo (1986): court "shall" hold hearing within 60 days on application for unconditional release of prison committed after being found not quality by reason of mental disease or defect); and *State v. Hoover,* 719 S.W.2d 812, 817-818 (Mo. App. W.D. 1986) (same).

but that unless a continuance is granted, if a trial is not had within that period, "no court of this state shall have jurisdiction of such indictment, information, or complaint ... and the court shall ... dismiss[] the same with prejudice." *Id.* Neither §632.495 nor §632.492 similarly limit the trial court's jurisdiction in a proceeding for commitment of a sexually violent predator, where retrial is not had within the 90-day time frame.

With regard to context and legislative intent, reading the 90-day provision as directory is in keeping with the SVP act as a whole and its purpose. The Western and Southern District of the Court of Appeals have rejected claims analogous to Mr. Donaldson's, in *State v. Will*, 753 S.W.2d 333 (Mo. App. S.D. 1998) and *State v. Hoover*, 719 S.W.2d 812 (Mo. App. W.D. 1988), and the rationale is instructive here. In *Hoover*, a person was committed to the Department of Mental Health, after he was found not guilty by reason of mental disease or defect; he subsequently filed an application for conditional release under §552.040. 719 S.W.2d at 813. Subsection 4 of the statute provided that written objections to release could be filed within 10 days, and that hearing on such applications "shall" be held within 60-days thereof, unless the

parties otherwise agree. *Id.* at 815. The hearing was held after the elapse of 60 days. *Id.*

The Western District noted that the 60-day provision was not accompanied by a penalty for failure to hold the hearing within 60 days, and that generally, the absence of such a provision supports the directory nature of a statutory provision. *Id.* at 816. The court also noted the principle that when a statute specifies a time frame for a public officer to perform an official act regarding the rights and duties of others, the statute "is directory, unless the nature of the act to be performed, or the phraseology of the statute, is such that the designation of time must be considered a limitation on the power of the officer." *Id.* (citation omitted). "That is because 'the public should not be made to suffer for the dereliction of public officers.'" *Id.*, quoting *State v. Holmes*, 253 S.W.2d 402, 404 (Mo. banc 1952). Therefore, "a provision enacted 'with a view merely to the proper, orderly and prompt conduct of the business' by the public official, is directory and not mandatory.'" *Id.*, quoting *State ex inf. Gentry v. Lamar*, 291 S.W.2d 457, 458 (Mo. banc 1927); *State v. Wynn*, 666 S.W.2d 862, 864 (Mo. App. 1984).

In light of those principles, the Western District concluded that §552.040 embodied both mandatory and directory aspects in the pursuit of the statutory objective. *Id.* But the court rejected Mr. Hoover's argument that the 60-day time provision is mandatory, because that construction "slight[ed] the statutory objective":

> The purpose of chapter 552, once a person accused of crime is acquitted by reason of mental disease or defect excluding responsibility, is to retain that person in custody until 'it is determined by the procedures in [§552.040.4]' that the person does not have a mental disease or defect rendering him dangerous – and cognately, that the person shall not remain in commitment after the condition of mental disease or defect has lapsed.

Id. Sure, §552.040.4 provides that upon application for release, the committed person "shall be released by order of the court," unless objections to his release are timely lodged. The court held that

that portion of the statute was mandatory. *Id.* Were the appropriate official to fail to object, the court reasoned, the official would have effectively conceded the fact of the person's freedom from mental disease or defect. *Id* at 817.

But in contrast, lapse of the 60-day provision for hearing after timely objection "incurs no consequence." *Id.* at 818. The subsection contained no limitation on the court's power to act after 60 days, and imposed no "liability for dereliction." *Id.* The directive simply related

> to the manner of exercise of the power the enactment vests in the public officers, and provide[d] a regular, orderly and convenient procedure for its exercise. That component [the 60-day provision] is directory, not mandatory. It is sufficient if the compliance with procedure, albeit tardy, substantially subserves the statutory purpose without jeopardy to any substantial right.

Id., citing *Gentry*, 291 S.W.2d at 458.

The Southern District in *Will,* a case with facts substantially identical to *Hoover*, adopted the Western District's "exceptionally well reasoned opinion." 753 S.W.2d at 834.

The *Hoover* analysis fits well in the instant case. The purpose of the SVP law is to provide control, care, and treatment of persons found to be sexually violent predators:

> If the court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the director of the department of mental health for control, care and treatment until such time as the person's mental abnormality has so changed that the person is safe to be at large.

§632.495 (Cum. Supp. 2005). Like the law at issue in *Hoover* and *Will*, the SVP law contains mandatory components that go to the issue of need for the person's care, control and treatment. For example, the law provides the definition of mental abnormality, and establishes the burden of proof. §§632.480(2) and 632.495.

But the 90-day retrial provision is akin to the 60-day provision in §552.040.4. The SVP law contains no explicit

consequence or liability for the lapse of the 90-day provision, and no limitation on a court's power to act after the 90 days. To quote *Hoover*, the provision simply relates "to the manner of exercise of the power the enactment vests in the public officers, and provides a regular, orderly and convenient procedure for its exercise." 719 S.W.2d at 818. That is a directory provision.

The SVP caselaw of at least five other states also supports our position. In those states, when sexually violent predators have been tried beyond the time limits established by analogous statutes and the statutes are silent as to jurisdiction, the various appellate courts have held that the failure is not of jurisdictional moment, and that the time frames are directory. *People v. Evans,* 132 Cal. App. 4th 950, 34 Cal Rptr. 3d 55 (2005); *Commonwealth v. DeBella,* 816 N.E. 2d 102 (Mass. 2004); *In re Detention of Huss,* 688 N.W.2d 58 (Iowa 2004); *In the Commitment of Beyer*, 633 N.W.2d 627 (Wis. 2001); and *In the Interest of M.D.*, 598 N.W.2d 799 (N.D. 1999).

The North Dakota Supreme Court held in *In the Interest of M.D.*, 598 N.W.2d 799 (N.D. 1999), that its statute was directory. The North Dakota Sexually Violent Predator Act is similar to the Kansas act. *Id.* at 805. The Court upheld an extension from the

time limit even after the time limit had expired, because the expiration of the time limit did not deprive the court of jurisdiction. *Id.* at 803. The Court relied on the reasoning of an earlier case, *In re. Nyflot*, 340 N.W.2d 178, 182 (N.D. 1983), in which it had held:

> The statute, read in its entirety, reflects a balance between the due process rights of the respondent and the respondent's possible need for treatment and society's interest in ensuring that that treatment is forthcoming. We believe that a construction of the word 'shall' as directory rather than mandatory most accurately reflects the intent of the Legislature and effectuates the purposes of the legislation.

Id. at 803.

The Wisconsin Supreme Court reached a similar conclusion in *In the Commitment of Beyer*, 633 N.W.2d 627 (2001), holding that a time limit in the Wisconsin Sexually Violent Predator Act is directory rather than mandatory:

> First, we note that the legislature has not indicated any penalty for the State's failure to comply (with the time limit). Next, we turn to the object and history of the statute.... The principal purposes behind [the Wisconsin Sexually Violent Predator Act] are (1) the treatment of convicted sex offenders who are at a high risk to reoffend, and (2) the protection of the public from such offenders.... Were we to conclude that the [time limit in Wisconsin Sexually Violent Predator Act] is mandatory, the consequences would undermine these objectives.

Id. at 632.

The Iowa Supreme Court held *In re Detention of Huss,* 688 N.W.2d 58, 63-64 (Iowa 2004), that failure to meet the time frames in the Iowa Sexually Violent Offenders Act, caused by the availability of an expert, was not grounds for dismissal.

The California Court of Appeal held in *People v. Evans,* 34 Cal Rptr. 3d 35, 39 (Cal. Ct. App. 2005), that failure to meet the time

frames was not grounds for dismissal: "(A)pplication of the mandatory dismissal statutes would be inconsistent with the character of SVP proceedings." *Id.* Among other reasons, "the dismissal of an SVP petition would affect public safety at large." *Id.*

And in *Commonwealth v. DeBella,* 816 N.E. 2d 102, 108 (Mass. 2004), the Massachusetts Supreme Court held that dismissal of a sexually violent persons proceeding for failure to timely try the matter was not in order when the delay was caused by the failure to come up with a trial date within the prescribed period. "[T]here [was] no showing of prejudice to the defendant, and the defendant [made] no such claim. Thus, there is nothing to suggest that the delay at issue here 'substantially prejudiced' the defendant, or that any prejudice would have prevented the allowance of a continuance." *Id.*

Moreover, the Court of Appeals' opinion is not supported by the primary authority that it cites, *In the Matter of the Care and Treatment of Searcy*, 49 P.3d 1 (Kan. 2002), including cases cited therein. Slip Op. 5 (noting that the Kansas case law is "instructive"). In *Searcy*, the Kansas Supreme Court held that the

statutory, 60-day limit for trying a sexually violent predator after the probable cause hearing was a jurisdictional limit, though the statute did not explicitly so provide. 49 P. 3d at 10.

The court's analysis in *Searcy* was thoroughly criticized by a more recent decision of the Kansas Court of Appeals, arising out of 12 consolidated sexually violent predator appeals, captioned as *In the Matter of the Care and Treatment of Hunt, et al.*, 82 P.3d 861, 869, 872 (Kan. App. 2004) ("One might justly criticize *Searcy*" for equating "'mandatory' and 'jurisdictional'..."; "Given our ambivalence about the soundness of the jurisdictional holding of the *Brown-Blackmore-Searcy* line of decisions..."). [8]

The court in *Hunt* also pointed out that after the *Searcy* line of decisions, the Kansas legislature responded by enacting amendments to the Kansas sexually violent predator law, explicitly providing that the time limitations contained in the law "either as originally enacted or as amended, are intended to be directory and not mandatory," and that the 60-day limit in particular is "not jurisdictional." *Id.* at 870 (citing K.S.A. 2003

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[8] A copy of the *Hunt* decision is attached to the State's motion for rehearing.

Supp. 59-29A01 and K.S.A. 2002 Supp. 59-29a06, respectively). In so many words, according to the Kansas legislature, the Kansas Supreme Court got it wrong in *Searcy*. In *Hunt* the court then held that it would apply these amendments retroactively. *Id.* at 874.

Ultimately, the Kansas Court of Appeals concluded in *Hunt* that the failure of the various trial courts to hold trials within the 60-day statutory window was not a jurisdictional issue and the 12 appellants were not entitled to relief from their commitment orders. *Id.* at 874. In summing up, the *Hunt* court opined that the Kansas Supreme Court would approve:

> [T]his conclusion also has the virtue of working a practical correction in the direction of the law set by *Brown, Blackmore,* and *Searcy*. This is a correction we believe our Supreme Court would endorse if given the opportunity to do so.

Id. Indeed, the Kansas Supreme Court did not take up the *Hunt* decision: Mr. Hunt's petition for review was denied May 25, 2004.[9]

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[9] The Kansas Appellate Courts docket sheet for *Hunt*, case no. 89-601, is accessible on line at http://judicial.kscourts.org:7780.

In short, if Kansas case law is at all persuasive here, it favors the State's and trial court's interpretations, not Mr. Donaldson's, and does not support the Court of Appeal's January 10 opinion.

Mr. Donaldson cites a line of Florida case law. *See* Appellant's Substitute Brief, p. 62. The Florida SVP statutes contain a 30-day provision for commencement of trial after a probable cause finding. Fla. Stat. §394.916(1) (1999). In 2000, the Florida Supreme Court construed the time provision as mandatory – but not jurisdictional. *State v. Goode*, 830 So.2d 817 (Fla. 2000). Last year, the Court clarified that if a petition is dismissed because trial was not timely commenced, it is a dismissal without prejudice. *Osborne v. State*, 907 So. 2d 505, 508 (Fla. 2005). Suffice to say, the Florida Supreme Court performed the mandatory-directory analysis differently than Missouri case law provides. *See Goode,* 830 So.2d at 823 ("shall" is generally interpreted as mandatory). And we do not concede that there is such a thing as a dismissal without prejudice under the Missouri SVP law.

* * * * *

That the word "shall" is directory does not mean that what the statute provides is not important. Certainly, in providing time frames for trial, the legislature has instructed the courts and the parties to move SVP cases along. What the legislature did *not* say is that failure to comply with a time frame – for whatever reason – is a failure of jurisdictional moment. And the State's position does not render the 90-day limit "meaningless," as Mr. Donaldson argues. Delay in a trial setting can be addressed by writ, or by filing for an array of sanctions, including, in the proper case, the sanction of dismissal. What truly renders the time limit meaningless is to permit an expert to sandbag the State by refusing to make herself available for trial, and to effect dismissal of an action and unsupervised release into the general public of an individual who is an untreated, sexually violent predator. Indeed, it seems plain that had the court forced Mr. Donaldson to proceed to trial within the 90 days, when his expert could not attend, he would perhaps have an argument for prejudice.[10]

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[10] As noted in the Statement of Facts, Mr. Donaldson did call Dr. Maskel to testify, live, at his September 2004 retrial.

The trial court's decision to deny Mr. Donaldson's motion to dismiss should be affirmed.

II. **The trial court correctly refused to grant Mr. Donaldson's motion to dismiss, which was based on a draft policy. The draft policy – concerning prisoner referral for SVP review by the Department of Corrections – was never an official policy of the Department; did not establish any protectable rights; and was outdated and did not apply to Mr. Donaldson in any event. [responds to Appellant's Point I]**

Standard of review. Mr. Donaldson argues in his Point I that the trial court should have granted his motion to dismiss, because he did not qualify for referral, by the Department of Corrections, for review under the SVP law at all.

The facts concerning this issue are not in dispute. The issue is a pure question of law and is therefore reviewed *de novo*. *Missouri Soybean Assoc. v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003); *Crow v. Kansas City Power & Light Co.*, 174 S.W.3d 523, 528 (Mo. App. W.D. 2005).

Mr. Donaldson had no rights established by a draft policy. Moreover, the draft policy was outdated and did not apply to him. The trial court properly denied his motion to dismiss.

Discussion. Though Mr. Donaldson states in his first Point Relied On that the trial court's failure to apply the original draft

policy to him violated his right of "procedural" due process, Appellant's Substitute Brief, p. 43, the essence of his argument is that the original draft policy created a substantive right *not* to be referred, *e.g.*, Appellant's Substitute Brief, p. 49 ("[The Department of Corrections] violated its established procedure and referred Mr. Donaldson to Attorney General's Office[, resulting] in the deprivation of his liberty after the completion of his prison sentence.")

Much of Mr. Donaldson's argument is pegged to his implicit assumption that MOSOP and the Sexually Violent Predator Act are redundant, and that completion of MOSOP excludes referral for care and treatment under the SVP law. Not so.

Both are statutory enactments, passed about a decade apart. MOSOP, the Missouri Sex Offender Program, was established with the passage of §589.040.1, RSMo, in 1990. "MOSOP is not penal in nature. ... [I]t is a rehabilitative program [that a prisoner] is required to complete before he is eligible for parole." *State ex rel. Nixon v. Pennoyer,* 36 S.W.3d 767, 770 (Mo. App. E.D. 2000). The length of a prisoner's sentence is not affected by his completion of, or failure to complete, MOSOP. *Id.*

The Missouri Sexually Violent Predator Act, §632.480, *et seq.* RSMo, became effective on January 1, 1999. The Act "revised Missouri's sex offender registration statute and provided a procedure for the civil commitment of individuals determined to be 'sexually violent predators'." *State ex rel. Nixon v. Askren,* 27 S.W.3d 834, 836 (Mo. App. W.D. 2000). It was patterned after Kansas's Act, which the United States Supreme Court upheld against constitutional attack in 1997. *Id.* at 837, *citing Kansas v. Hendricks,* 521 U.S. 346 (1997).

The SVP law explicitly tells an agency with custody of a person such as Mr. Donaldson what it should consider with regard to referral for his evaluation under the SVP law. The SVP law makes no reference to MOSOP whatsoever:

> When it appears that a person <u>may meet the criteria of a sexually violent predator</u>, the agency with jurisdiction shall give written notice of such to the attorney general and the multidisciplinary team.

§632.483 (emphasis added).

The "criteria of a sexually violent predator" are well-established. Under §632.480(5), a sexually violent predator is a person who

> suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, and who has been found guilty of, or plead guilty to, a sexually violent offense.

A "mental abnormality" is a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes him "serious difficulty in controlling his behavior." §632.480(2); *In the Matter of the Care and Treatment of Thomas*, 74 S.W.3d 789, 792 (Mo. banc 2002).

Of course, MOSOP had been in effect for a number of years when the SVP law was enacted. The legislature is presumed to have been aware of the law. *Suffian v. Usher*, 19 S.W.3d 130, 133 (Mo. banc 2000) (the legislature is presumed to have been aware of the state of the law at the time it passes a statute). Had the

legislature intended the sexually-violent-predator definition to *exclude* individuals who successfully completed MOSOP, then the legislature could have so provided, but it did not choose to.

Indeed, the logic of allowing individuals who have completed MOSOP to be referred for review under the SVP law is well-illustrated by Mr. Donaldson's own history. He completed MOSOP before being paroled on his first rape conviction (Tr. 446). While out on parole, he committed another violent sex offense, and was returned to prison (Tr. 447).

Turning, then, to Mr. Donaldson's argument concerning the effect of Corrections' draft policy, one flaw immediately becomes plain. No state agency may issue a policy or regulation that contradicts a state statute. *See Bridge Data Co. v. Director of Revenue*, 794 S.W.2d 204, 207 (Mo. banc 1990) (Director of Revenue cannot "add to, subtract from, or modify" revenue statutes by regulation); §536.014(3), RSMo (2000) (no rule shall be valid if it conflicts with state law). As the then-new SVP law came into effect, Corrections explored how to handle its responsibility of making prisoner referrals for review. The original draft of the policy (that existed up to July 1999) was a work in progress and the exclusion that it

contained, for completion of MOSOP, did not square with the SVP statute, §632.483.1, which provided that if a person meets the statutorily-established SVP criteria, the agency shall refer the person. Corrections did not formally promulgate that draft, nor any version containing the exclusion, and in fact dropped the exclusion when it revised the draft in July 1999.[11]

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[11] To be clear, the draft policy language did not explicitly refer to inmates who had "completed" MOSOP. The exclusion was stated more or less in the negative, covering inmates who had "failed, refused or been terminated from [MOSOP] and have exhausted all opportunities to complete MOSOP." (Supp. LF 6). Whether that language could be construed to cover *more* inmates than those who had completed MOSOP at the time of referral, the distinction is irrelevant. The only evidence of record concerning Corrections' application of the exclusion was that Corrections did not, in the first half of 1999, refer inmates who had completed MOSOP (Supp. LF 41). In other words, if the original draft policy covered more inmates, Corrections did not apply it that way.

The point is, if a properly-promulgated policy cannot change a statute, *Bridge Data*, 794 S.W.2d at 207, certainly an un-promulgated draft of a policy that changes a statute cannot.

Moreover, the draft policy was never promulgated in accordance with Missouri law. It was therefore null, void, and unenforceable as a rule. §536.021.7, RSMo (2000).

Further, even if the original draft somehow created a right not to be referred for SVP review, which it did not, such right was not etched in stone. The Department was always free to change or terminate the original draft policy. *C.f. State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135-136 (Mo. banc 1995). In *Cavallaro*, this Court addressed a due process challenge brought by an inmate who claimed a liberty interest in the application of an old parole statute to him, rather than a new one. *Id.* The Court explained that as far as substantive due process is concerned, when the legislature creates a statutory entitlement, it is not precluded from later changing or terminating the entitlement, *id.* at 136. By analogy here, if the Department created a regulatory entitlement not to be

referred, it was not precluded from later terminating that entitlement, and permissibly did so.[12]

In any event, Mr. Donaldson did not qualify for exclusion under the original draft policy. He was referred after June 1999, after Corrections had revised the original draft and dropped the exclusion. In other words, the original draft did not apply to exclude him because he was not referred in the time frame in which it was "in effect."

The trial court correctly denied Mr. Donaldson's motion to dismiss based on the draft policy.

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[12] As far as procedural due process goes, Mr. Donaldson does not identify any procedure he should have been afforded but was not. Regardless, he received notice and the opportunity to be heard concerning his commitment at the probable cause and trial stages, as provided in §§632.489 (2000) and .492 (Cum. Supp. 2005).

III. The trial court properly allowed evidence of Mr. Donaldson's antisocial personality disorder. The evidence was relevant to the issues and was in any event cumulative. [responds to Appellant's Point III].

Standard of review. The trial court is vested with broad discretion concerning the admissibility of evidence and a reviewing court will not interfere with the decision of the trial court absent an abuse of discretion. *Hancock v. Shook,* 100 S.W.3d 786, 795 (Mo. banc 2003).

Discussion. The trial court properly allowed in evidence of Mr. Donaldson's antisocial personality disorder. As discussed below, the State's expert testified that Mr. Donaldson had a number of psychological diagnoses, including antisocial personality disorder and sexual sadism, either of which qualified as a mental abnormality under the SVP law.

In an SVP commitment case, the State bears the burden of proving beyond a reasonable doubt that the respondent suffers from a mental abnormality that makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility, and has been found guilty of, or plead guilty to, a sexually violent offense. §632.480(5). A mental abnormality is a

congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to commit sexually violent offenses in a degree that causes him "serious difficulty in controlling his behavior." §632.480(2); *In the Matter of the Care and Treatment of Thomas*, 74 S.W.3d 789, 792 (Mo. banc 2002).

Admission of evidence of Mr. Donaldson's personality disorder in this case was not novel. Such evidence has been admitted in other SVP cases and supported judgments that the persons qualified as SVPs; and its admission has withstood challenges on appeal. *See In the Matter of the Care and Treatment of Heikes,* 170 S.W.3d 482 (Mo. App. W.D. 2005)(anti-social personality disorder and voyeurism); *In the Matter of the Care and Treatment of Pate,* 137 S.W.3d 492 (Mo. App. E.D. 2004)(narcissistic personality disorder with antisocial features). In the Eastern District case, Mr. Pate argued that his diagnosis of antisocial personality disorder could not support his commitment because it could not qualify as a mental abnormality under the SVP law. 137 S.W.3d at 496-497.

The Eastern District refused to apply a hyper-technical construction to the statutes, holding that the State simply must prove three things: (1) a congenital or acquired condition; (2) that

the condition affects the emotional or volitional capacity, which would predispose the person to commit sexually violent offenses; and (3) that the condition must cause the person serious difficulty in controlling his behavior. *Id.* at 497-498. The evidence supported all three elements and Mr. Pate's personality disorder qualified as a mental abnormality for purposes of the SVP law. *Id.* at 498.

As we noted in the Statement of Facts, the State called Dr. Roy Lacoursier to testify as its expert witness. Dr. Lacoursier, a psychiatrist, examined Mr. Donaldson (Tr. 435). He diagnosed Mr. Donaldson with personality disorder not otherwise specified; sexual sadism; paraphillia; substance abuse; and a gambling disorder (Tr. 455, line 11).

Dr. Lacoursier testified at length about his findings. He testified that, to a reasonable degree of medical certainty, Mr. Donaldson's personality disorder and sexual sadism both qualify as a "mental abnormality," as the term is used in the SVP law (Tr. 437; Tr. 476-480; Tr. 481-Tr. 482). He also testified that, to a reasonable degree of medical certainty, the mental abnormalities make Mr. Donaldson more likely than not to engage in predatory

acts of sexual violence if not confined in a secure facility (Tr. 437; Tr. 481- 496).

Among other things, Dr. Lacoursiere explained to the jury that Mr. Donaldson's antisocial personality disorder predisposed Mr. Donaldson to commit sexually violent offenses (Tr. 534). Mr. Donaldson repeatedly beats his victims of sexual assault. He repeatedly forces his victims into numerous sexual acts. He committed such sexual assaults numerous times over a number of years (Tr. 466). Dr. Lacoursiere also cited Mr. Donaldson's behavior of being verbally abusive to women by calling them names with sexual overtones (Tr. 467, line 15). The doctor's opinion that Mr. Donaldson had a qualifying mental abnormality under the SVP law was relevant and properly admitted.

Further, the evidence of Mr. Donaldson's anti-social personality disorder was in addition to the disorder of sexual sadism, with which Dr. Lacoursier also diagnosed Mr. Donaldson, and about which the doctor testified (e.g., Tr. 463-465). Mr. Donaldson does not argue that the sexual sadism diagnosis cannot qualify as a mental abnormality. Thus, while properly admitted and relevant, even if not, the evidence of Mr. Donaldson's

personality disorder was at most cumulative and non-prejudicial, and its admission therefore cannot justify reversal. *In the Matter of the Care and Treatment of Wadleigh v. State*, 145 S.W.3d 434, 438 (Mo. App. W.D. 2004).

The trial court did not abuse its discretion in allowing evidence of Mr. Donaldson's personality disorder, and should be affirmed.

Conclusion

The trial court properly denied Mr. Donaldson's motion to dismiss concerning the timing of his retrial; properly denied his motion to dismiss which was based on a draft policy; and properly allowed proof of Mr. Donaldson's personality disorder into evidence. The Court of Appeals' decision with regard to the dismissal issue should be vacated, and the trial court's decisions affirmed in all respects.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 24th day of May, 2006, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 9,580 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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Deputy Solicitor

Appendix

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